IN THE

Supreme Court of the United States

October Term, 1960
No. 23

MICHAEL FORD,

Plaintiff-Appellant

v.

ATTORNEY GENERAL OF PENNSYLVANIA, DISTRICT ATTORNEY OF SCHUYLKILL COUNTY, SHERIFF OF SCHUYLKILL COUNTY, AND SERGEANT IN CHARGE OF PENNSYLVANIA STATE TROOPERS STATIONED AT MAHANOY CITY, SCHUYLKILL COUNTY, PENNSYLVANIA,

Defendants-Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO DISMISS OR AFFIRM

FRANK P. LAWLEY, JR.
Deputy Attorney General
ANNE X. ALPERN
Attorney General
Attorneys for Appellees

Department of Justice
Commonwealth of Pennsylvania
State Capitol
Harrisburg, Pa.

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa

TABLE OF CONTENTS

	Page
Motion To Dismiss or Affirm:	
Statement of Questions Involved	4
Statement of the Case	2
Argument:	
I. The District Court properly dismissed that portion of the Complaint seeking to enjoin the enforcement of a State criminal statute for want of equity	5
II. The District Court properly relinquished jurisdiction of that portion of the Complaint relating to the seizure of pinball machines as alleged gambling devices	10
Conclusion	17

TABLE OF CITATIONS

Cases:

American Legion Post No. 51 Appeal, 397 Pa. 430, 156 A. 2d 107 (1959), affirming 188 Pa. Super. Ct. 480, 189 A. 2d 483 (1959)	2
American Legion Post No. 51 v. Commonwealth of Pennsylvania, No. 881 October Term, 1959, U. S. , 28 L.W. 3367	2
Beal et al. v. Missouri Pacific Railroad Corp., 312 U. S. 45 (1941)	7
City of Houston et al. v. Jas. K. Dobbs Co. of Dallas, 232 F. 2d 428 (5th Cir., 1956)	8
Commonwealth v. Kaiser, 80 Pa. Super. Ct. 26 (1922)	10

Denton et al. v. City of Carrollton, Georgia et al., 235 F. 2d 481 (5th Cir., 1956) 8

Douglas et al. v. City of Jeanette et al., 319 U. S. 157 (1943) 8

Ford v. Attorney General et al., 274 F. 2d 820 (3d Cir., 1960) 3

Hewitt v. National Sur. Corp., 130 F. Supp. 110 (Ga., 1955) 14

Morgan v. United States, 107 F. Supp. 501 (W.D. Ky., 1952) 12, 14, 15

Rice v. Walls, 213 F. 2d 693 (6th Cir., 1954) 14

Schuettler v. Maurer et al., 159 Pa. Super. Ct. 110, 112 (1946) 11

Spielman Motor Sales Co., Inc. v. Dodge, 295 U. S. 89 (1935) 5, 6, 7

Stefanelli et al. v. Minard et al., 342 U. S. 117 (1951) 14

United States v. Korpan, 354 U. S. 271 (1957) 3

United States v. Three Gambling Devices, 161 F. Supp. 5 (W.D. Pa., 1957) 14, 15

United States v. Three Trade Boosters, 135 F. Supp. 24 (M.D. Pa., 1955) 14

Watson et al. v. Buck et al., 313 U. S. 387 (1941) 8

STATUTES:

Act of March 31, 1860, P. L. 382, 18 Purdon's Pa. Stat. Annotated, §§1445, 1446 10, 11, 15

Act of June 24, 1939, P. L. 872, Section 605, 18 Purdon's Pa. Stat. Annotated, §4605 8

The Johnson Act, 64 Stat. 1134 (1951), 15 U.S.C. 1171-1177 (1958) 11

46 Stat. 754 (1930), 19 U.S.C. 1602 et seq. (1958) 11

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Defendants-Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled case move to dismiss the appeal or, in the alternative, to affirm the judgment of the United States District Court for the Eastern District of Pennsylvania on the following grounds:

1. The appeal does not present a substantial Federal question.

2. The questions on which the decision of the District Court depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

On November 24, 1959, the Supreme Court of Pennsylvania affirmed the judgment of the Pennsylvania Superior Court declaring "multiple coin pinball machines" to be gambling devices *per se*. *American Legion Post No. 51 Appeal*, 397 Pa. 430, 156 A. 2d 107 (1959), affirming 188 Pa. Superior Ct. 480, 189 A. 2d 483 (1959).

On June 20, 1960, this Court granted a Motion to Dismiss the appeal filed in that case, *sub nom, American Legion Post No. 51 v. Commonwealth of Pennsylvania*, No. 881 October Term, 1959, — U. S. — 28 L.W. 3367.

On December 28, 1959, appellant filed a complaint in the court below alleging that he owns "several" of the type pinball machines covered by the Supreme Court's decision, but had converted them to "single-coin" machines. He asked for a restraining order on the ground that, notwithstanding the alleged conversion, it was the intention of state law enforcement officers to seize his machines under the Supreme Court's decision.

The object of the machines in question is to place steel balls in numbered holes in the horizontal playing field, which numbers are reflected upon a "Bingo" type card on the vertical backboard. If three or more balls are placed in holes which "line-up" on the backboard, the player receives "free plays". The number of such plays is dependent upon the number of

balls placed in line, the odds given to him and the bonus features present in a given game. The odds, bonus features and extra balls may or may not be obtained (depending upon chance) upon the insertion of additional coins. The machines also contain a knockdown button, two or three recording meters, and a reflex unit which changes the ratio of coins necessary to obtain the extra features in proportion to the free plays registered. Adjustment plugs to increase game difficulty are also present. A detailed description of the machines operation is contained in the Superior Court's opinion (188 Pa. Superior Ct. 408); See also, *United States v. Korpan*, 354 U. S. 271.

On December 30, 1959 a single district judge, after hearing, granted a preliminary injunction. However, on appeal the Court of Appeals for the Third Circuit dissolved the injunction on the ground that the matter was one for a three-judge district court. *Ford v. Attorney General of Pennsylvania et al.*, 274 F. 2d 820 (3 Cir., 1960). Thereafter, such three-judge district court was constituted and on May 23, 1960, issued its Opinion and Order denying relief to the appellant.

A two week supersedeas was granted by the District Court to allow time for application to this Court for a supersedeas pending appeal.

Application for such supersedeas was made to the Honorable William J. Brennan, Jr., Circuit Justice for the Third Circuit, who on June 9, 1960, denied the application.

STATEMENT OF QUESTIONS INVOLVED

Where the Supreme Court of Pennsylvania has declared multiple-coin pinball machines gambling devices *per se*, and appellant possesses such illegal machines which he has converted to single-coin operation (it being conceded that his machines can be reconverted to prohibited gambling devices), are substantial questions presented on appeal to the Supreme Court of the United States which need further argument:

1. Where a District Court dismisses, for want of equity, a complaint seeking to enjoin the enforcement of a State criminal statute which makes it a misdemeanor to set up or maintain a gambling device and federal questions can be set up in an ordinary State criminal prosecution?

2. Where a District Court relinquishes jurisdiction of a complaint seeking to enjoin the enforcement of a State criminal statute, under which the legality or illegality of appellant's pinball machines can be established, and such statute affords appellant both procedural and substantive due process?

Under the above circumstances, are substantial Federal questions involved?

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DISMISSED THAT PORTION OF THE COMPLAINT SEEKING TO ENJOIN THE ENFORCEMENT OF A STATE CRIMINAL STATUTE FOR WANT OF EQUITY

Appellant sought to enjoin the enforcement of Section 605 of the Act of June 24, 1939, P. L. 872, 18 Purdon's Pa. Stat. Annotated §4605. (Appellant's Appendix A, 2a, footnote 2). This is a criminal statute making it a misdemeanor to set up or establish a gambling device.

The well established general rule is that the Federal Courts will not enjoin the enforcement of a state criminal statute even though the statute is alleged to be unconstitutional. In no case is the doctrine set forth more clearly than it was by Chief Justice Hughes in *Spielman Motor Sales Co., Inc. v. Dodge*, 295 U.S. 89, 95 (1935):

> "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500. See, also, In re Sawyer, 124 U.S. 200, 209-211; Davis & Farnum Manufacturing Co. v. Los Angeles, 189 U.S. 207, 217. To justify such interference there

must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. See Terrace v. Thompson, 263 U.S. 197, 214; Packard v. Banton, 264 U.S. 140, 143; Tyson v. Banton, 273 U.S. 418, 428; Cline v. Frink Dairy Co., 274 U.S. 445, 452; Ex parte Young, 209 U.S. 123, 161-162. We have said that it must appear that 'the danger of irreparable loss is both great and immediate'; otherwise, the accused should first set up his defense in the state court, even though the validity of a statute is challenged. There is ample opportunity for ultimate review by this Court of Federal questions. Fenner v. Boykin, 271 U.S. 240, 243, 244."

As the court emphasizes, in order to invoke the equitable jurisdiction of the Federal Court there must be "exceptional circumstances" and a "clear showing" that "the danger of irreparable loss is both great and immediate."

In the *Spielman* case, the plaintiff sought an injunction in the Federal District Court to enjoin the District Attorney of New York County from enforcing a New York State statute which made it a misdemeanor to violate any provision of a code of fair competition under the National Industrial Recovery Act. The United States Supreme Court, after pointing out that the plaintiff's bill merely contained "general allegations of irreparable damage" and unconstitutionality, stated:

"* * * But the bill failed to state facts sufficient to warrant such conclusions, which alone were not enough * * *" (295 U.S. at 96)

The Court then concluded that the bill:

> "* * * should have been dismissed upon the ground that it failed to state a case within the equitable jurisdiction of the District Court * * *" (295 U.S. at 97)

No evidence was presented to the District Court. It is submitted that there has been no "clear showing" on plaintiff's part to justify intervention. Here, as in the *Spielman* case, the District Court had before it only the general allegations of irreparable damage contained in the complaint. Plaintiff states that he is the owner of "several" converted multiple coin machines and that "as a result of confiscating these machines he will permanently lose the privilege of leasing them * * *: his property and business rights will be destroyed and the damage will be great and irreparable." No facts have been alleged nor proved sufficient to warrant such conclusions and under the *Spielman* holding plaintiff has failed to state a case "within the equitable jurisdiction of the District Court." (295 U.S. at 97)

The theory of the federal cases is that plaintiff must resort to his defenses in the state courts. He can there raise the pertinent federal questions and have ample opportunity to obtain review of these questions by the Supreme Court of the United States.

The principles set forth in the *Spielman* case have been followed by the Supreme Court of the United States down to the present time. For their most recent application see *Beal et al. v. Missouri Pacific Railroad Corp.*, 312 U.S. 45 (1941) (irreparable damage alleged but not found as a fact by trial court);

Watson et al. v. Buck et al., 313 U.S. 387 (1941) (mere statement by prosecuting officer that he intends to enforce state law is no proof of threatened irreparable injury); and *Douglas et al. v. City of Jeanette et al.*, 319 U.S. 157 (1943) (declared intention to institute other prosecutions not sufficient to establish irreparable injury).

In those cases where equitable jurisdiction has been successfully invoked, the showing of "irreparable damage" in no way compares to the instant situation. In effect, there must be a clear showing that the risks of imprisonment, fines and general financial burdens are such that to deny equitable relief would be tantamount to the denial of judicial review altogether. See: *Denton et al. v. City of Carrollton, Georgia et al.*, 235 F. 2d 481 (5 Cir., 1956); *City of Houston et al. v. Jas. K. Dobbs Co. of Dallas*, 232 F. 2d 428 (5 Cir., 1956).

With reference to Section 605 of the Pennsylvania Penal Code, Circuit Judge Biggs, speaking for the three-judge District Court said:[1]

> "* * * the threatened action against Ford under Section 605 clearly would be a criminal proceeding and the jurisdiction of the court to enjoin such proceedings must be determined against the background of the long standing federal policy that equity will not interfere to prevent the enforcement of a criminal statute, even though unconstitutional, unless the danger of irreparable loss is both great and immediate. Spielman Motor Sales Co. v. Dodge, 295 U.S. 89

[1] Appellant's Appendix A, 7a.

(1935); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925). There is no such showing here. If the plaintiff should be arrested his guilt would be tested and he would be tried by due process of law. The federal question can be set up in the state court. The criminal case against the plaintiff, if one ensues, will be an ordinary criminal prosecution. No more than a single prosecution is apparently contemplated. No multiplicity of criminal proceedings is even suggested. There is no necessity for the intervention of equity here. Cf. Harrison v. N. A. A. C. P., 360 U.S. 167, 177 (1959). It would be an abuse of discretion for this court to grant the relief sought by the plaintiff under this aspect of the case. That portion of the complaint based on Section 605 of the Act of June 24, 1939, must be dismissed for want of equity."

Under the circumstances it is submitted that the question presented with reference to Section 605 is so unsubstantial as not to need further argument.

II.

THE DISTRICT COURT PROPERLY RELINQUISHED JURISDICTION OF THAT PORTION OF THE COMPLAINT RELATING TO THE SEIZURE OF PINBALL MACHINES AS ALLEGED GAMBLING DEVICES

The seizure and destruction of gambling devices is authorized in Pennsylvania by Section 60 of the Act of March 31, 1860, P. L. 382, 18 Purdon's Pa. Stat. Annotated §1445.[2] Appellant sought to enjoin the enforcement of this statute after alleging that he owned "several" converted multiple coin pinball machines and that "as a result of confiscating these machines, he will permanently lose the privilege of leasing them, his property and business rights will be destroyed, and the damage will be great and irreparable."

However, the very statute in question is a complete answer to his allegations. It contemplates personal notice to the appellant upon seizure of his machines and requires a hearing at the next Quarter Sessions Court to determine whether his machines are subject to forfeiture and destruction. Permanent loss to the appellant would result only if after hearing the court is satisfied that the machines are gambling devices *per se*, in which case no property rights may be asserted. *Commonwealth v. Kaiser*, 80 Pa. Superior Ct. 26 (1922). If the Court is not satisfied, provision is

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[2] Appellant's Appendix A, 2a, footnote 1.

made for the return of the machine and for damages in case the seizure was malicious. Further, notwithstanding the provisions of Section 61 of the same act (18 P.S. §1446) prohibiting replevin prior to an adjudication by the court as to whether the machines are gambling devices, the Superior Court of Pennsylvania has stated that the issue may be raised on petition of an owner seeking to recover possession of his property which has been seized: *Schuettler v. Maurer et al.*, 159 Pa. Superior Ct. 110, 112, 46 A. 2d 586 (1946).

It is the Commonwealth's position that this remedy is more than adequate to protect appellant from irreparable damage. *Indeed, it is far less punitive than the remedy provided by federal law where alleged gambling devices are seized by federal officers.*

Provision is made for federal seizure of gambling devices under the so-called Johnson Act, 15 U.S.C. 1171-1177. Such seizure is under the provisions of the law relating to the seizure and forfeiture of property for violation of the customs laws (15 U.S.C. 1177).

The procedures outlined in the customs laws (19 U.S.C. 1602 et seq.) authorize a non-judicial sale of property having a value of less than $2500.00 after publication of intention in a newspaper for three weeks (19 U.S.C. 1607), unless a claimant of the property files a claim within 20 days from the first publication and executes a bond in the amount of $250.00 to cover costs in the event he is unsuccessful, after which a judicial condemnation may be had (19 U.S.C. 1608). Only if the property exceeds the value of $2500.00 must judicial condemnation be instituted upon seizure (19 U.S.C. 1610).

Pennsylvania's procedure contemplates personal notice, a judicial hearing in all cases and no destruction until after a court is satisfied that the property is contraband.

The Federal Courts have denied injunctive relief where alleged gambling equipment has been seized by federal officers. In *Morgan v. United States*, 107 F. Supp. 501 (W.D. Ky., 1952), plaintiffs asked for an injunction based upon the unconstitutionality of the Johnson Act, and asked for a three-judge court; further, they requested that in the event it be found constitutional, the District Judge should adjudge that the Act did not apply to the property seized; that in either event, the machines, be restored to their respective owners; and that if they could not be returned plaintiffs be awarded compensation for their value. A motion to dismiss was filed. Circuit Judge Miller, speaking for the Court, after outlining the federal condemnation procedures under the customs laws, stated at page 504:

> "The rule appears well settled that where a statute provides for an administrative remedy a party is not entitled to injunctive relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L. Ed. 638; Macauley v. Waterman S. S. Corp., 327 U.S. 540, 66 S. Ct. 712, 90 L. Ed. 839; Smith v. Duldner, 6 Cir., 175 F. 2d 629. The rule is applicable in the present case even though the plaintiffs' constitutional rights are alleged to be violated. Aircraft & Diesel Equipment Corp. v. Hirsch, supra, 331

U.S. 752, 67 S. Ct. 1493; Smith v. Duldner, supra, 6 Cir. 175 F. 2d 629, 631. See Dodge v. Osborn, 240 U.S. 118, 36 S. Ct. 275, 60 L. Ed. 557; Bailey v. George, 259 U.S. 16, 20, 42 S. Ct. 419, 66 L. Ed. 816. The constitutionality of the statute under which the property was seized can be made an issue in the condemnation proceedings in the District Court. United States v. Childs, D. C. 43 F. Supp. 776; United States v. One Oldsmobile Sedan, D. C. 75 F. Supp. 83, 85; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 345-346, 57 S. Ct. 816, 81 L. Ed. 1143; State of Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 133-139, 67 S. Ct. 544, 91 L. Ed. 794. Nor is the case removed from the operation of the rule because of any attack on the adequacy and constitutionality of the administrative review provided by the Act, which issues can be decided in the administrative hearing. Arrow Distilleries, Inc. v. Alexander, D. C. 24 F. Supp. 880, 882, affirmed 306 U.S. 615, 59 S. Ct. 489, 83 L. Ed. 1023; Myers v. Bethlehem Shipbuilding Corp., supra, 303 U.S. 41, 49, 58 S. Ct. 459.

"Plaintiffs' rights are thus fully protected by the administrative procedure provided by the Act, and they should be required to pursue that remedy instead of seeking injunctive relief through the pending actions. Myers v. Bethlehem Shipbuilding Corp., supra, 303 U.S. 41, 58 S. Ct. 459; Macauley v. Waterman S. S. Corp., 327 U.S. 540, 66 S. Ct. 712, 90 L. Ed. 839.

"The motions to dismiss the complaints are sustained (citing cases)."

See also: *Rice v. Walls*, 213 F. 2d 693 (6 Cir., 1954); *Hewitt v. National Sur. Corp.*, 130 F. Supp. 110 (Ga. 1955).

If the Federal Courts refuse to enjoin the enforcement of a federal law relating to forfeiture of gambling devices, there is even more reason to refuse to enjoin the enforcement of a similar state law. Mr. Justice Frankfurter said in another connection that the considerations governing the exercise of equitable jurisdiction in state matters "* * * touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States" *Stefanelli et al. v. Minard et al.*, 342 U.S. 117 (1951), where the Federal Courts refused to enjoin the use of evidence allegedly obtained by illegal means, in a pending state criminal proceeding.

We submit that Pennsylvania's law enforcement officers are entitled to the same tools as federal officers to suppress gambling, and should not be judged by a more restrictive standard than that required in federal matters. The fact that appellant will be temporarily deprived of his property pending the judicial determination is not significant. In fact, this is the Federal practice: *Morgan v. United States*, supra; *United States v. Three Trade Boosters*, 135 F. Supp. 24 (M.D. Pa. 1955); *United States v. Three Gambling Devices*, 161 F. Supp. 5 (W.D Pa. 1957).

No federal case has been found in which alleged gambling devices have been returned pending con-

demnation proceedings; nor does the time between seizure and determination appear significant in the federal cases. See *United States v. Three Gambling Devices*, supra (19 months); *Morgan v. United States*, supra (9 months).

As to the enforcement of Section 60 of the Act of March 31, 1860, P. L. 382, supra, the Court below said:[3]

> "It is well established that when a bill for a preliminary injunction to restrain the enforcement of a state statute fails to set up a substantial federal question the single judge of a district court to whom an application for a three-judge court was made may dismiss the complaint on the ground that it presents no substantial federal question, Ex Parte Poresky, 290 U.S. 30 (1933), and we conclude with reference to Public Law 60 of the Act of March 31, 1960 that no substantial federal question is presented on this record. The statute affords the plaintiff procedural due process of law if, as he alleges, his single-coin pinball machines are seized. Public Law 60 provides for a hearing in the Court of Quarter Sessions of the appropriate county where all issues presented can be adjudicated. The plaintiff may appeal that court's decision to the Superior Court and thence to the Supreme Court of Pennsylvania in some cases if the decision be adverse to him. See, e.g., Return of Trombetta, supra.
>
> "Turning now to substantive due process, we again fail to see any merit in the plaintiff's con-

[3] Appellant's Appendix A, 5a-6a.

tentions. It is asserted that there is a denial of equal protection of the laws under the Fourteenth Amendment in that the plaintiff's pinball machines, converted from multiple-coin to single-coin operation, are about to be treated discriminatorily in relation to pinball machines originally constructed to receive only a single coin at a time. The parties have stipulated that the plaintiff's machines may be reconverted to unlawful multiple-coin pinball machines. Compare In Re Return of Trombetta, supra. To phrase the plaintiff's argument in another way, he asserts that it would be a denial of equal protection of the laws to outlaw single-coin machines that can be converted to multiple-coin machines, while not outlawing similar single-coin pinball machines which cannot be converted to multiple-coin operation. Under the present interpretation of the Fourteenth Amendment it is clear that the fact that the machines, otherwise lawful, may be converted to outlawed gambling devices constitutes a sufficient reason for giving them differential treatment. Furthermore, the Attorney General claims that certain non-convertible single-coin machines may also be seized and hence any claim of discrimination must be based on gross speculation. Certainly under the operative facts of the present record such an issue cannot rise to the dignity of a substantial federal question. To hold otherwise would unduly disrupt state judicial process."

It is submitted for the foregoing reasons the Court below properly relinquished jurisdiction and the

question presented with reference to the seizure statute is so unsubstantial as not to need further argument.

CONCLUSION

For all of the foregoing reasons, appellees move that this appeal be dismissed or the judgment of the District Court affirmed.

Respectfully submitted,

FRANK P. LAWLEY, JR.
Deputy Attorney General

ANNE X. ALPERN
Attorney General
Attorneys for Appellees